

John Meyer, MT Bar # 11206
Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771
(406) 546-0149 | Phone
John@cottonwoodlaw.org

GALLATIN COUNTY CLERK
OF DISTRICT COURT
JENNIFER BRANDON

2020 FEB 18 PM 4:48

FILED

BY _____ DEPUTY

Counsel for Plaintiff

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

MONTANA RIVERS, GALLATIN)
WILDLIFE ASSOCIATION,)
COTTONWOOD ENVIRONMENTAL)
LAW CENTER)

Plaintiffs,)

vs.)

MONTANA DEPARTMENT OF)
ENVIRONMENTAL QUALITY)

Defendant.)

Case No. DV-20-200A

COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Gallatin River in southwest Montana is fabled for its clean water, amazing scenery, and abundance of fish. Parts of the movie “A River Runs Through It” were filmed on the Gallatin River. People come from all over the world to enjoy the river and surrounding area.
2. Development in the resort town of Big Sky, Montana, is threatening the quality of the Gallatin River. As more and more vacation homes are built in Big Sky, the unincorporated destination town is finding itself confronted with the problem of how to dispose of its waste water.
3. In 1995, the Montana legislature recognized that certain state waters are of such environmental, ecological, or economic value that the state should prohibit changes to the existing water quality of those waters. Montana Code Annotated § 75-5-315. To that end, water bodies that are designated an Outstanding Resource Water protect (“ORW”) are safeguarded from pollution to “the greatest protection feasible.” Montana Code Annotated § 75-5-315. “Pollution” is broadly construed and includes, but is not limited to, “the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.” Mont. Code Ann. §75-5-103(30)(a)(ii).
4. In 2001, American Wildlands, a Bozeman-based conservation group, filed a petition with the Montana Board of Environmental Review (“BER”) seeking to have the

stretch of the Gallatin River from the boundary of Yellowstone National Park to the confluence of Spanish Creek designated as an ORW.

5. In 2002, the BER ordered the Montana Department of Environmental Quality (“DEQ”) to prepare an Environmental Impact Statement to disclose the potential impacts of an ORW designation.

6. In 2007, the Montana DEQ published a Final Environmental Impact Statement. Under the Proposed Action, the BER would adopt a rule designating the river as an ORW.

7. Thirteen years later, the DEQ has still not issued a Record of Decision.

8. In 2018, Gallatin Wildlife Association and Cottonwood Environmental Law Center petitioned the Board of Environmental Review to designate the same stretch of the Gallatin River as an Outstanding Resource Water.

9. During the October 5, 2018 hearing on the petition, the Montana Department of Environmental Quality presented to the Board of Environmental Review and stated:

DEQ is also concerned about pharmaceutical pollution, as those are emerging issues of concern with regard to pharmaceuticals, and also certain personal care products.

10. Montana Rivers, Gallatin Wildlife Association, and Cottonwood Environmental Law Center now bring this lawsuit to require the DEQ to prepare a supplemental Environmental Impact Statement.

11. The Montana Environmental Policy Act requires preparation of a supplemental Environmental Impact Statement when there are significant new circumstances or information bearing on the proposed action. A.R.M. 17.4.621; A.R.M. 36.2.533.

12. Since MEPA is modeled after the National Environmental Policy Act (NEPA), the Montana Supreme Court has determined that federal case law construing parallel provisions in NEPA is persuasive. *Montana Wildlife Federation v. Montana Bd. of Oil and Gas Conservation*, 365 Mont. 232, 244 (2012).
13. The Montana Supreme Court has construed a parallel supplemental NEPA regulation. *North Fork Preservation Ass'n v. Department of State Lands*, 238 Mont. 451, 457-59 (Mont. 1989) citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).
14. An agency that has prepared an EIS cannot simply rest on the original document. *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) citing *Marsh*, 490 U.S. at 374.
15. Agencies have a continuing duty to gather and evaluate new information, even after release of an EIS. *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) citing *Marsh*, 490 U.S. at 374.
16. When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require a supplemental EIS. *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000).
17. The threshold for triggering a supplemental EIS is low. *See, e.g., League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014).
18. In this case, the DEQ violated MEPA by failing to consider whether new Information or changed circumstances were of such significance as to require a supplemental EIS.

19. In particular, the Environmental Protection Agency has issued notices stating pharmaceuticals are being detected in surface water and ground waters within the Region. According to the notices, there is “new information” that many of these chemicals may “pose a threat to aquatic life.” The EPA has expressed concern that exposure to these chemicals has “an adverse effect on ecological or human health.” According to the EPA, the “occurrence, fate, and transport of these chemicals are an important water quality concern, both nationally and regionally, and have gained public interest.”

20. The resort town of Big Sky is considering polluting the Gallatin River with pharmaceuticals, either through direct discharge or through snowmaking at Big Sky Resort. The original EIS did not consider or analyze pharmaceuticals being discharged either directly or indirectly into the Gallatin River.

21. The Montana DEQ violated the Montana Environmental Policy Act by failing to determine whether the information was significant and required preparation of a supplemental EIS.

22. The DEQ’s failure to prepare a supplemental Environmental Impact Statement violated the Montana Environmental Policy Act.

JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction over claims brought under Mont. Code Ann. § 27-8-202 (uniform declaratory relief); Mont. Code Ann. § 27-19-101 (injunctive relief). The Montana Administrative Procedures Act and Montana Environmental Procedure Act provide the right of review. Mont. Code Ann. § 2-4-701.

24. Venue lies in Gallatin County pursuant to Mont. Code Ann. § 25-2-126 and Mont. Code Ann. § 2-4-506(4) because Plaintiffs are located and have their principal place of business in this judicial district.

PARTIES

25. Plaintiffs MONTANA RIVERS, GALLATIN WILDLIFE ASSOCIATION, and COTTONWOOD ENVIRONMENTAL LAW CENTER are Bozeman-based conservation organizations dedicated to protecting the people, forests, water, and wildlife of the American West. Plaintiffs' members use the Gallatin River extensively for fishing, swimming, and rafting. Plaintiffs' members' aesthetic, scientific, inspirational, educational, health, conservation and economic interests are adversely affected by the Montana Department of Environmental Quality's failure to prepare a supplemental Environmental Impact Statement.

26. The above-described financial, aesthetic, recreational, scientific, inspirational, educational, health, conservation and other interests of the Plaintiffs have been, are being, and, unless the relief prayed for is granted, will continue to be adversely and irreparably injured by Defendant's failure to prepare a supplemental Environmental Impact Statement. These are actual, concrete injuries to Plaintiffs that would be redressed by the relief requested in this complaint. Plaintiffs have no other adequate remedy at law.

27. Defendant MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY is the state agency that prepared the Environmental Impact Statement and is responsible for preparing any supplements.

FIRST CAUSE OF ACTION

28. Plaintiff incorporates by reference all preceding paragraphs.

29. Defendants failure to determine whether the new information or changed circumstances regarding pharmaceuticals and new discharges are significant violates MEPA and MAPA. A.R.M. 17.4.621; A.R.M. 36.2.533.

SECOND CAUSE OF ACTION

30. Plaintiff incorporates by reference all preceding paragraphs.

31. Defendants failure to prepare a supplemental EIS because of the significant new information, including new concerns over the effects of pharmaceuticals and other chemicals, violates MEPA and MAPA. A.R.M. 17.4.621; A.R.M. 36.2.533.

PRAYER FOR RELIEF

WHEREFORE, Plaints respectfully request that the Court:

- A. Adjudge and declare that Defendant violated the Montana Environmental Policy Act and Montana Administrative Procedures Act.
- B. Order Defendant to prepare a supplemental EIS.
- C. Enjoin Defendant from issuing any permit to discharge treated waste water into the Gallatin River.
- D. Issue any other temporary, preliminary, and/or permanent injunctive relief as may be specifically requested hereafter by Plaintiff.
- E. Award Plaintiff their reasonable attorney fees, costs, and litigation expenses, under the Private Attorney General Theory, and/or any other applicable provision of law.
- F. Grant such further and additional relief as the Court deems just and proper in order to remedy the violations of law alleged herein and to protect the interests of the Plaintiffs and the public.

Respectfully submitted this 18th day of February, 2020.

/s/ John Meyer
JOHN MEYER
Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771
(406) 546-0149 | Phone
John@cottonwoodlaw.org
Counsel for Plaintiffs

I hereby certify that I served the foregoing document to counsel for the Defedants via regular mail, postage pre-paid.

Rob Cameron
Deputy Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

Dated:_____ Signed:_____